No. 14564.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & CO., a Corporation,

Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,

Appellees.

APPELLANT'S OPENING BRIEF.

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I.

Statement as to Jurisdiction.

This is an action for damages for fraud. Jurisdiction in the District Court on the action existed under Section 1332, Title 28, United States Code [see allegations at R. 3-5].

Jurisdiction of this court on appeal exists under Section 1291, Title 28, United States Code.

II.
Statement of the Case.

This appeal is taken from a judgment of dismissal in favor of defendants Metropolitan Engravers, Ltd., Metropolitan Mat Service, Inc., Gregory F. Duffy, Aubrey A. Duffy, Alfred Smutz, and Walter C. Duffy [R. 95-96] and from a summary judgment in favor of the defendant Frank R. Blade [R. 94-95]. The nature of the pleadings upon which these judgments were based cannot be better summarized than by adopting the summary of the facts contained in the memorandum opinion of the trial court, which opinion was reported in 123 Fed. Supp. 136 [R. 65-87]. These facts were stated by the trial court as follows:

> "By its amended complaint the plaintiff seeks to recover damages for fraud from Blade (its former employee for many years), Metropolitan Engravers, Ltd., a corporation; Metropolitan Mat Service, Inc., another corporation; Gregory F. Duffy, Aubrey A. Duffy, and Walter Duffy, and Alfred Smutz, officers and directors of those two corporations, and Barnard Engraving Company, Inc., a corporation, and James G. Barnard and Margaret Davis, alleged to be the officers, agents and representatives of the Barnard Company.
>
> "The substance of the plaintiff's cause of action is alleged to be as follows: defendant Blade was employed by the plaintiff in the capacity of Advertising Manager for what it refers to as its Los Angeles Group of stores; as part of his duties as such Advertising Manager, he was required to negotiate and contract for the engraving of material which was to be used, and was used, by the plaintiff in connection with its advertising in newspapers; that from January 1, 1937, until the month of December, 1951, de-

fendant Blade entered into and executed many contracts with the defendant Metropolitan Engravers, which company, in turn manufactured engravings which were sold to, and used by, the plaintiff in its newspaper advertising; that throughout the entire period the defendant Metropolitan Engravers and its officers and agents 'secretly, fraudulently, unfairly and deceptively conspired and agreed that the defendants "Engravers" and "Mat Service" would pay to, and the defendant Frank R. Blade would receive and accept secret, fraudulent, unfair and deceptive rebates, profits or commissions in the sum of $400.00 per month in consideration of which said defendant Blade would contract for all engraving to be purchased by the Los Angeles Group of stores owned and operated by plaintiff with said defendant "Engravers" and no other person, firm or corporation, and would permit them to charge and would procure plaintiff to pay them sums of money greatly in excess of the then going price for identical quantities of identical or similar engraving current in the Los Angeles market and at prices substantially in excess of the prices which plaintiff would have been charged by competitors of defendants for like quantities of engraving of like grade and quality. In particular it was agreed between said defendants that plaintiff would be charged and would pay to said defendant "Engravers" sums of money based upon varying basic prices of $.033 to $.044 per unit of engraving, although the fair market price in the Los Angeles area and the prices concurrently charged other purchasers in said area who were competitors of plaintiff for like quantities of engraving of like grade and quality was $.030, or less; and that, for extra work in connection with such engraving not included in such unit price, equivalent additional charges over and above the fair market

price for such extra work would be made by defendant "Engravers" and paid by plaintiff.'

"It is further alleged in the complaint that prior to October 31, 1949, defendant Blade was instructed by plaintiff to contract for part of the engraving for the Los Angeles Group of stores with engraving firms other than the defendant Metropolitan Engravers; that thereupon the defendants and each and all of them, further contracted and agreed among themselves that the engraving business of the plaintiff should be divided between the defendant Metropolitan Engravers and the Barnard Company, and that no other person, firm or corporation should be allowed or permitted to secure any such business; that the base price would be $.044 per unit 'and not at the fair market price in the Los Angeles area of $.030, or less.' It is also alleged that the Barnard Company and James G. Barnard and Margaret Davis also agreed to pay Blade a secret profit amounting to 15% of the gross amount of all moneys received from plaintiff for engraving done by the Barnard Company. It is further alleged that said agreements were carried out and executed by the defendants. The complaint has attached to it a list of payments beginning February 6, 1942, to November 29, 1951, and alleges that the total amount paid for engraving during that period was the sum of $563,504.50; that the fair market value was the sum of $141,979.95 less than the total figure. It is also alleged that the dates and amounts of purchases of engravings made by plaintiff from defendant Engravers during the period of time from on or about January 1, 1937, until on or about February 5, 1942, and the total amount so charged by defendants and paid by the plaintiff during that period are unknown to the plaintiff. It is alleged that the difference between the fair market value and the amount paid by plaintiff to Barnard Co. was the sum of $20,021.50.

"The plaintiff then alleges that the total amount received by Blade from the Metropolitan Engravers and Metropolitan Mat Service was a sum in excess of $50,000 and the amount paid to Blade by the Barnard Co. was $8,250.

"The circumstances of the discovery of fraud are alleged to be that all of the acts and agreements and conduct of the defendants, above described, were unknown to the plaintiff until on or about the 10th day of December, 1951; that on or about the 6th day of July, 1951, plaintiff received an anonymous letter to the effect that some unidentified person who was engaged in purchasing for the plaintiff was engaged in receiving secret payoffs. The letter did not identify the party charged, but the letter caused the plaintiff to investigate those engaged in purchasing, which resulted in the discovery by them, on or about the 10th day of December, 1951, of the acts and conduct upon which it bases its claim for relief. The complaint seeks actual damages totaling $162,001.45, and $250,000 as exemplary or puntive damages.

"Defendant Frank R. Blade has answered with the usual denials * * * and as a separate defense alleges in his sixth additional defense that prior to the filing of the Amended Complaint herein on August 21, 1953, and prior to the filing of the original complaint herein on May 2, 1952, and, to wit: On December 10, 1951, the plaintiff filed a complaint for money had and received in the Superior Court of the State of California in and for the County of Los Angeles, wherein the plaintiff herein was plaintiff therein and the defendants Frank R. Blade and Nella Blade were defendants; that the plaintiff in that case secured a writ of attachment under the provisions of Section 537 of the Code of Civil Procedure of the State of California and caused the same to be levied

by the Sheriff of Los Angeles County; that in response to a demand for a bill of particulars, Sears, Roebuck filed a bill of particulars which contains, in substance, the same charges contained in the complaint herein, and that by the filing of the Superior Court action the plaintiff made an election of remedies, resulting in damage or injury to the defendant Blade and that by virtue of such election of remedies, the plaintiff is estopped from maintaining the instant suit against Frank R. Blade."

Although not emphasized by the trial court in its statement of facts, it is to be noted that although the complaint alleges that Metropolitan Engravers and Metropolitan Mat Service paid Appellant's advertising manager Blade a sum in excess of $50,000, and defendant Barnard Company paid Blade the sum of approximately $8,250 as bribes [R. 12-13], Appellant by its amended complaint does not seek in this action the recovery of these amounts, but only the over-charges, or excess over the fair market value of the engraving work done by Metropolitan and Barnard in the respective amounts of $141,979.95 and $20,021.50, or an aggregate recovery for these overcharges of $162,001.45 [R. 16]. In addition, exemplary or punitive damages of $250,000 are prayed against the defendants [R. 16]. In short, in this action no recovery is sought of the commissions, allowances, rebates or bribes paid to and received by Appellant's employee Frank R. Blade. By like token, in the state court action the pleadings did not allege nor was recovery sought for the fraudulent overcharges for engraving; the action was exclusively one for monies received by Blade for the account of his employer, Sears, Roebuck & Co. [see Complaint, R. 38-39, and Bill of Particulars, R. 45-47].

In point of fact, no appearance was entered in said cause by defendant Barnard Engraving Company or by the individual defendants, alleged to be officers and agents of defendant Barnard Company, namely, James G. Barnard and Margaret Davis, and the action was not prosecuted against these defendants.

III.
Specification of Errors.

1. The trial court erred in holding that Appellant had but a single cause of action for the receipt of secret commissions by its agent and for damages for the fraudulent overcharges made through the connivance of the defendant suppliers and the agent.

2. The trial court erred in holding that there was a violation of but a single primary right when Appellant's agent received secret commissions in violation of his fiduciary obligation and when he and the defendant engravers conspired to and did fraudulently overcharge Appellant for engraving services.

3. The trial court erred in holding that the statute of limitations barred any recovery by Appellant antedating by more than three years the discovery by it of the fraud.

IV.
Summary of Argument.

1. The cause here on appeal presents a simple, albeit unsavory, factual situation: An employer, Appellant herein had in its employ a trusted but allegedly dishonest advertising manager, who is alleged to have received bribes from engraving suppliers of the Appellant; these suppliers in turn were enabled, through the bribery and connivance of the advertising manager, to overcharge Appellant for

engraving furnished to it over a period of many years. Appellant proceeded in the state court to recover the unlawful commissions or bribes paid to its agent Blade, in the form of a common count for money had and received [R. 38-39], and in a separate and distinct action in the federal court is now seeking to recover from the defendant engravers and Blade the damages suffered by the Appellant as the direct result of the alleged conspiracy to defraud Appellant, to-wit, the overcharges it was forced to incur. It is the position of Appellant that these causes of action are mutually consistent and concurrent, and that by proceeding with its action in the state court against its employee for moneys received by him for the use and benefit of Appellant, his employer, it has not precluded itself from proceeding with its separate and distinct cause of action for damages arising out of the fraudulent conspiracy between the engravers and its employee to overcharge Appellant for engraving services.

2. Upon the allegations of the amended complaint, Appellant contends that the Statute of Limitations, Section 338, Subdivision 4 of the California Code of Civil Procedure, did not commence to run until the discovery by Appellant of the facts constituting the fraud perpetrated upon it, to-wit, until on or about December 10, 1951.

ARGUMENT.

I.

Appellant Has Separate, Distinct and Concurrent Causes of Action (a) Against Its Agent for Commissions Received for Its Use and Benefit, and (b) Against Its Agent and the Third Party Suppliers for Their Fraud in Overcharging Appellant.

The whole *ratio decidendi* of the trial court is predicated upon the assumption that Appellant had one primary right or cause of action against the defendants, and that having elected to proceed against its agent in the state court for money had and received and to have had an attachment levied in its favor in that action, it had irrevocably elected its remedy and was precluded from thereafter proceeding to seek recovery of the damages it had allegedly suffered by reason of the fraud and conspiracy of the third party suppliers and the agent to overcharge Appellant on its contracts for engraving. If the trial court was wrong in this premise, the judgments must inevitably be reversed.

Although we are frank to admit that no decisions of the appellate courts of the State of California have been found which are directly in point, the decisions which have considered the rights of an aggrieved employer or principal under circumstances such as the present all point to the inescapable conclusion that he has separate and distinct and concurrent remedies (1) to recover secret commissions or bribes wrongfully paid to and received by his agent, and (2) to recover the damages suffered by him as a result of the corruption of his agent.

The cases and authorities are legion which uphold the right of a principal or employer to recover from his agent commissions or bribes paid to the agent by third parties. We refer to such cases and authorities as:

Savage v. Mayer, 33 Cal. 2d 548, 203 P. 2d 9;

Ramey v. Myers, 111 Cal. App. 2d 679, 245 P. 2d 360;

Petrol Corporation v. Chartrand, 93 Cal. App. 2d 635, 209 P. 2d 674;

Thomas v. Snyder, 114 Cal. App. 397, 300 Pac. 117;

Tobin Grocery Co. v. Spry, 204 Cal. 247, 267 P. 2d 694;

Cal. Lab. Code, Sec. 2860;

Annotations in 13 A. L. R. 905, 71 A. L. S. 923 and 102 A. L. R. 115.

These cases and authorities will be commented upon below.

The decisions and authorities are equally numerous to the effect that third parties conspiring with an employee or agent to defraud the principal are liable for all damages proximately caused thereby.

See:

Anderson v. Thacher, 76 Cal. App. 2d 50, 72, 172 P. 2d 533;

Lomita Land & Water Co. v. Robinson, 154 Cal. 36, 46, 97 Pac. 10;

Goodrich v. Naples (D. C., S. D. Cal.), 121 Fed. Supp. 345;

Vol. II, Restatement of the Law, Agency, Secs. 312 and 313(1).

These cases and precedents will similarly be adverted to below.

The immediate question for decision, however, is whether the foregoing respective rights are independent of each other or are so mutually inconsistent that the prosecution of one right or remedy constitutes an irrevocable election precluding the prosecution of the other right or remedy. The decisions which have considered the point make it clear that the rights of action are separate, distinct, consistent and concurrent.

Restatement of the Law, Agency, Volume II, Section 407(2):

> "(2) A principal who has recovered damages from a third person because of an agent's violation of his duty of loyalty is entitled nevertheless to obtain from the agent any profit which the agent improperly received as a result of the transaction."

In the comment to this subsection (2) of the Restatement it is noted, page 935:

> "If an agent has violated a duty of loyalty to the principal so that the principal is entitled to profits which the agent has thereby made, *the fact that the principal has brought an action against a third person and has been made whole by such action does not prevent the principal from recovering from the agent the profits which the agent has made.** Thus, if the other contracting party has given a bribe to the agent to make a contract with him on behalf of the principal, the principal can rescind the transaction, recovering from the other party anything received by him, or he can maintain an action for damages

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*Italics ours throughout unless otherwise noted.

against him; *in either event the principal may recover from the agent the amount of the bribe.*"

In *Callinan v. Federal Cash Register Co., et al.* (D. C., W. D. Mo.), 3 F. R. D. 177, the plaintiff brought action against his purchasing agents, Federal Cash Register Co. and Kyle W. Leeds, for money had and received, and against the agents and the third party supplier, General Engineering and Manufacturing Co. for fraud. The court noted, page 177:

> "There are five counts. The first three are for money had and received. These three counts apparently affect the moving defendants only. The last two counts are for damages arising from alleged fraud and generally charge all the defendants with participation."

The agents moved to dismiss the common counts for failure to state a claim in that they failed to show the origin of the indebtedness or the date when it was incurred. Judge Reeves overruled the motions, holding the common counts to be sufficient, but observed that some question might be raised as to whether the two actions were properly joined. He held in effect, however, that although the causes of action were separate and distinct no prejudice resulted from having them considered together. Page 177:

> "On the first three counts of the petition a joint cause of action is stated only against the two moving defendants. The pleader does not pretend to state a cause of action against the answering defendant on these three counts. There is no reason, however, why these should not be treated separately from the last two counts upon the present petition. The defendants will not be handicapped because of this fact. *It means two suits in one complaint.*

"The last two counts are predicated upon fraud and the averments are quite precise in setting out the nature of the fraud and the time it is alleged to have been committed. Such averments are that the two moving defendants were acting for the plaintiff in purchasing machinery from the answering defendant. It is alleged that false and inflated invoices were used; that such invoices were fraudulently made up by the answering defendant with knowledge that they would be used by the moving defendants. Such averments were sufficient to show fraud.

"It follows that the motions of each of said defendants should be overruled."

Tarnowski v. Resop, 236 Minn. 33, 51 N. W. 2d 801. This was an action by a principal against his agent for the recovery of improper profits realized by the agent and for damages to his business suffered by the principal by reason of the agent's defection. As in the case at bar, the defendant agent urged that the principal, having rescinded the purchase in a prior action against the third party sellers, was thereafter precluded from prosecuting his action against the agent. As the court noted, page 802:

"Principally, defendant argues that recovery in the action against the sellers is a bar to this action for the following reasons: (1) That plaintiff has elected one of alternative remedies and cannot thereafter pursue another; (2) that successful pursuit of one remedy constitutes a bar to another remedy for the same wrong, even though the outcome of the first action did not make plaintiff whole in point of actual loss; (3) that the satisfied verdict in the rescission case is a bar; and (4) that defendant and the sellers were joint tort-feasors, and the discharge of one discharged them all."

In affirming judgment for the plaintiff and holding that he was entitled to recover unlawful profits as well as damages from the agent, notwithstanding the earlier action for rescission, the court relying upon Restatement, Agency, Section 407(2), *supra,* held, page 804:

> "Defendant contends that plaintiff had an election of remedies and, having elected to proceed against the sellers to recover what he had paid, is now barred from proceeding against defendant. It is true that upon discovery of the fraud plaintiff had an election of remedies against the sellers. *It is not true, however, that, having elected to sue for recovery of that with which he had parted, he is barred from proceeding against his agent to recover damages for his tortious conduct.* While some of the allegations in plaintiff's complaint against the sellers are similar to or identical with those in his complaint in this case, insofar as the fraud is concerned, the right of recovery here against the agent goes much further than the action against the sellers. Many of the elements of damage against the agent are not available to plaintiff against the sellers. For instance, he has no right to recover attorneys' fees and expenses of the litigation against the sellers. He has that right against the agent. *Plaintiff may recover profits made by the agent, irrespective of his recovery against the sellers.* Losses directly flowing from the agent's tortious conduct are not recoverable against the sellers in an action for rescission, but they may be recovered against the agent, whose breach of faith has caused such losses.
>
> "Nor is the settlement and dismissal of the action against the sellers a bar to an action against the agent, for the same reasons as stated above. The sellers and agent are not joint tort-feasors in the sense that their wrongful conduct necessarily grows

out of the same wrong. Their individual torts may have been based on the same fraud, but their liabilities to plaintiff do not have the same limitations. *In simple terms, the causes of action are not the same.*"

Kuntz v. Tonnele, 80 N. J. Eq. 373, 84 Atl. 624, is directly in point. The plaintiff Kuntz employed Shenckman as his agent to purchase a piece of property from defendant Tonnele. The latter agreed with Shenckman to sell the property for $14,000 and agreed, out of that consideration, to pay Shenckman a commission of $700. Subsequently, Shenckman conceived the idea of defrauding plaintiff Kuntz out of $1,000 by inducing the seller, Tonnele, to join with him in representing to Kuntz that the price was $15,000 instead of $14,000. It was agreed by Tonnele that Shenckman might retain the additional $1,000 for himself. With respect to the $700 commission or bribe the court said, page 626:

"With respect to the $700, it seems to me entirely clear that Shenckman was responsible to Kuntz for this, and that, unless Kuntz had permitted Shenckman as his agent to become the agent of the other party, or to obtain a commission from the other party, Kuntz unquestionably would have the right to recover this $700 from Shenckman.

* * * * * * * *

"The theory upon which such recovery is based entirely excludes any idea that a recovery in such case is possible against any one other than the agent receiving the secret profit. The theory is that whatever an agent makes in his principal's business belongs to the principal."

After holding that the recovery of this illegal commission represented an entirely separate and distinct cause of action upon a different theory, the court went on to

hold that the seller having conspired with the agent to defraud the purchaser out of the additional $1,000, the plaintiff was entitled to recovery of that amount from the third party seller. Page 626:

> "Entirely a different situation is presented with respect to the $1,000 added to the consideration price. Here there was clear fraud on the part of Tonnele and Shenckman against Kuntz. Tonnele, to obtain a thousand dollars out of Kuntz for Shenckman's benefit, misrepresented the consideration price to Kuntz, having agreed with Shenckman that he would give him this thousand dollars thus extracted from Shenckman's principal. A cleaner cut case of fraud could not well be conceived. Unquestionably, there arose out of this situation a right of action by Kuntz against Shenckman and also against Tonnele. The liability is not joint. The action is not joint. *The parties do not have to be sued together. The bases of recovery are different. In the action against Shenckman the basis of recovery, as above set forth, is the right of the principal to have whatever the agent got out of the transaction. The basis of the action against Tonnele is the fraud on Tonnele's part in misrepresenting the price and thereby occasioning damage and loss to Kuntz.*"

The court quoted at length from the leading English case on the point, *Mayor of Salford v. Lever,* 1 Q. B. 168 (1891), saying, page 626:

> "A case exactly in point, dealing fully, comprehensively and clearly with all of the questions, is Mayor and Aldermen of Salford v. Lever, 60 L. J., Q. B. 39 (1891), 1 Q. B. 168. I shall make extensive quotations therefrom because there will thus be shown the similarity of facts and the statement and determination of the questions involved more

satisfactorily than could be done by paraphrase. The plaintiff was a municipal corporation which was in the market to purchase large quantities of coal. Hunter was its agent to purchase same. The defendant was a coal merchant to whom Hunter gave orders to supply coal to plaintiff.

"Lord Esher, M.R., said: 'The corporation of Salford have brought this action against the defendant, who is a coal merchant, and it is an action founded on fraud. * * * (Page 175.) The defendant was at liberty to sell the coals at any price he would get for them, not necessarily at the market price, but the best price which he could obtain. He was bound, however, to act honestly. He offered this man Hunter to sell him coal at a price which would give him such a profit as he desired. But then Hunter tempted him by saying: "You want to sell your coals at a price which will give you a profit. I have the power of buying coals from you or from anybody else, and I will not buy them from you at the price at which you are selling them, unless you will help me to cheat the corporation out of another shilling a ton. You are to have your price; but you are to add to it in the bills which you send to the corporation another shilling per ton, making the real price apparently a shilling per ton more; but that shilling is to be mine. You are to give it to me." They called this a commission, * * * and commissions sometimes cover a multitude of sins. In the present case it was meant to cover a fraud. The fraud was this: That the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals in order to cheat the corporation out of a shilling a ton, which was to be paid to their own agent; and the way in which it was to be done was this: The defendant sent in a bill to the corporation for the whole price thus increased. He got

the advanced price into his hands, and, as he got it by fraud, he is bound to pay it back, unless something has happened to oust the right of the corporation.

* * * * * * * *

" 'If an agent takes a bribe from a third person, whether he calls it a commission or by any other name, for the performance of a duty which he is bound to perform for his principal, he must give up to his principal whatever he has by reason of the fraud received beyond his due. *It is a separate and distinct fraud of the agent.* He might have received the money without any fraud on the person who was dealing with him. Suppose that the person thought that the agent was entitled to a commission, he would not be fraudulent; but the agent would be, and it is because of his separate and distinct fraud that the law says he must give up the money to his principal, * * * and therefore he is entitled to recover from the agent the sum which he has received. *But does this prevent the principal from suing the third person also, if he has been fraudulent, because of his fraud?* It has been settled that he cannot set up the defense that the action cannot be maintained against him because the thing was done through the agent and the principal was entitled to sue the agent. *What difference can it make that the principal sues the third party secondly instead of first? The agent has been guilty of two distinct and independent frauds—the one in his character of agent, and the other by reason of his conspiracy with the third person with whom he has been dealing.* Whether the action by the principal against the third person was the first or the second must be wholly immaterial. The third person was bound to pay back the extra price which he had received, and he could not absolve himself or diminish the damages

by reason of the principal having recovered from the agent the bribe which he had received.

" 'Lindley, L. J. (Page 179.) * * * It is obvious that in some form of action the corporation has a right to recover this shilling a ton from the coal merchants. Under the old practice I think they could have recovered it by an action for money had and received; and probably they could have recovered it in more ways than one. (Page 180.) It would be paradoxical if the rights of the corporation were to depend upon the accident which of the two wrongdoers they sued first. * * * *The corporation has a separate cause of action against each of them, and not one cause of action against both or either of them.*

" 'Lopes, L. J. (Page 181.) The rights of action by the corporation against him (the defendant) and Hunter are separate, distinct, and independent of each other. *The right against Hunter is to recover the secret bribe which he has receiveed, and it is founded on his fraud in regard to that bribe.* The right against Lever is to recover the excess of price which he obtained through his fraud—a fraud, no doubt, in conjunction with Hunter, but an entirely separate and distinct fraud from that in respect of which the action against Hunter would be brought.

" 'It is said that these two actions cannot coexist. I think that contention cannot be supported. * * *' "

The Court of Appeals for the Third Circuit in *Barnsdall, et al. v. O'Day, et al.,* 134 Fed. 828, has held that the bringing of an action by a principal against his agent in the purchase of land for the amount of a commission secretly paid the agent by the seller, does not operate to ratify the contract of sale so as to discharge the seller from liability in damages for fraud by which,

with the assistance of the agent, the sale was induced. In affirming judgment for plaintiff the court said, page 829:

> "The agent of the plaintiffs below, in making this purchase for them, asked and received from the defendants the sum of $8,700 for himself. This payment was secretly made, and it is admitted, as it must be, that by reason thereof the sellers were precluded from maintaining that whatever knowledge the agent had respecting the real production of the property was imputable to his principals. But it is averred that the learned court erred in declining to rule that because, when the plaintiffs below, long afterward, learned of this misconduct of their agent, they made it the ground of an action against him, they 'legalized the payment and receipt of such commission, and he thereby became their full agent for all purposes of the purchase, and all knowledge of the production or condition of the property acquired by him at or before the time of the sale would be knowledge to his principals, the plaintiffs herein.' This proposition was properly negatived. *It could not have been affirmed without holding that a principal, who seeks redress against his agent for having wrongfully accepted money from those with whom he was authorized to deal, thereby discharges the latter from all liability for a fraud by which they, with his assistance, had misled the principal to his hurt. We know of no rule or principle of law which would justify us in so deciding.* * * * No authority has been cited which lends support to the contention that by bringing their action against the agent the defendants in error ratified the contract which was induced by the fraud in which he had participated. *The subject-matter of this action is not*

the same as that of the action against the agent; the two frauds were different."

The Court of Appeals for the Eighth Circuit, in *Glaspie v. Keator, et al.,* 56 Fed. 203, similarly held that a principal's recovery from his agent St. John of secret commissions did not preclude an action against a fraudulent third party seller, Glaspie, for damages. The court there stated, page 210:

"It is further contended that the circuit court erred in instructing the jury that the case in hand was not barred by a previous recovery in an action by Keator & Son against St. John. The merits of this contention can be best tested by a brief statement of the facts upon which the defense was based. Keator & Son first brought an action against St. John to recover damages for the same fraud and deceit that is complained of in the case at bar, and in such suit recovered a judgment for $5,000, which judgment has not been satisfied. In the course of the trial of the latter suit for fraud and deceit, Keator & Son discovered that St. John had received $18,000 from Glaspie of the sum which they had paid for the pine lands. They thereupon brought an action against St. John for the latter sum, and recovered the amount sued for, with interest, which judgment has been paid. The last-mentioned action was brought and maintained solely upon the ground that St. John was their agent in negotiating the purchase of the pine lands, and that the profit which he had secretly made in that transaction, through connivance with Glaspie, belonged to his principals. In stating their damages in the present action the plaintiffs below have given credit for the amount of the second judgment which was recovered against St. John, and was

by him paid. It is now insisted that the payment of the second judgment against St. John, for $18,000 and interest, operated to satisfy the first judgment against him, for $5,000, in the action for fraud and deceit, and *that the satisfaction of the latter judgment bars a recovery against Glaspie in the present action.*"

Noting that the second suit against the agent St. John was for recovery of an improper commission paid him, the court concluded:

"We are of the opinion that the circuit court properly directed the jury to disregard the plea of a former recovery, for the reason that the cause of action sued upon in the second suit against St. John was totally unlike the cause of action in the first suit, and totally unlike the cause of action in the suit at bar. There might have been a recovery against St. John in the second action even though no misrepresentations had been made by him as to the quantity of timber that the pine lands would yield, and the evidence which was sufficient to warrant a recovery in the second suit was utterly insufficient to justify a verdict in the first action. Furthermore, the damages recoverable in the respective suits were essentially different. These considerations warrant the conclusion that the payment of the second judgment against St. John did not operate to satisfy the first judgment for fraud and deceit, as was practically held by Mr. Justice Miller in Keator v. St. John, 42 Fed. Rep. 585."

The Court of Appeals for the Sixth Circuit, in *City of Findlay v. Pertz, et al.,* 66 Fed. 427, held that a city, upon discovering that purchases made on its behalf by its purchasing agent were the product of a corrupt ar-

rangement by which the agent was bribed, might both hold the agent liable for the wrongful commissions received and also sue the seller for damages for fraud. The court said, page 437:

> "The learned trial judge was of opinion, and so instructed the jury, that, upon discovery of the improper dealing with its agent, the city might repudiate or affirm the contract as it should elect. We entirely agree with him in this. The contract it made was neither *malum in se nor malum prohibitum.* No question of public policy is involved by a ratification of the bargain. That involves no affirmance or adoption of the corrupt agreement for illicit commissions. *Upon the contrary, it would have the right to hold the agent liable as for money had and received to its use. It might go still further, and sue the seller for the fraud, and recover all damages consequent upon an improper dealing with the buyer's agent.*"

The foregoing cases (and we have found none to the contrary) clearly establish that in a case such as that at bar the employer or principal has separate, distinct and concurrent remedies (i) to recover from its agent, in money had and received, secret commissions paid him by a third party, and (ii) to recover from the agent and the third party the amount of any damages suffered by the principal consequent upon the conspiracy and fraud of the agent and the third party *and that it matters not which action is commenced first.*

II.

The State Court Action Against the Agent Blade for Money Had and Received Rests Upon an Entirely Different Theory Than the Claimed Recovery of Damages for Fraud in the Present Action.

California Labor Code, Section 2860, codifies what has long been the common law, the Code Section being based upon former Civil Code Section 1985, which was adopted in 1872. The Section provides:

> "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment."

And see:

Savage v. Mayer, 33 Cal. 2d 548 at 551, 203 P. 2d 9.

It is clear that the state court action was not one to recover damages suffered by Sears, Roebuck & Co., but was an action to recover moneys received by Blade as agent and employee for the account of Appellant. While the action was brought in general *assumpsit* for money had and received it was not, as the District Court erroneously assumed in its opinion, necessarily predicated upon fraud or wrongdoing (necessitating a waiver of the tort and suit in *assumpsit*), but was for moneys rightfully belonging to the employer. See the Bill of Particulars in the state court action [R. 45-47], incorporated by reference in the affidavit in support of Blade's motion for summary judgment [R. 64].

That fraud or deceit on the part of the agent is not a necessary predicate in an action for recovery by his principal of secret profits arising out of the agency, is clear from the Labor Code Section above quoted—"whether acquired lawfully or unlawfully"—and from the cases.

In *Savage v. Mayer,* 33 Cal. 2d 548, 203 P. 2d 9, the plaintiff Savage sued his agent for $26,400 representing a secret profit made by the agent on a purchase of shares for his principal. The court there stated, page 551:

> "An agent, however, is not permitted to make any secret profit out of the subject of his agency. (*Langford v. Thomas,* 200 Cal. 192, 198-199 (252 P. 602); *Shaw v. Shaw,* 160 Cal. 733, 737, 739 (117 P. 1048); *Calmon v. Sarraille,* 142 Cal. 638, 641-642 (76 P. 486); *King v. Wise,* 43 Cal. 628, 634; *Thompson v. Stoakes,* 46 Cal. App. 2d 285, 289-290 (115 P. 2d 830); see Civ. Code, §§2322, subd. 3, 2238; Rest.. Agency, §§387, 388; 1 Mechem, Agency (1914), §§1224-1226.) All benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits in an appropriate action. (Mechem, Agency (1914), §1225; Rest., Agency, §403.) In the absence of special circumstances, moneys received by one in the capacity of agent are not his, and the law implies a promise to pay them to the principal on demand. (De Leonis v. Etchepare, 120 Cal. 407, 409-410 (52 P. 718); see also *Oil Well Core Drilling Co. v. Barnhart,* 20 Cal. App. 2d 677 (67 P. 2d 696); 1 Mechem, Agency (1914), §1342.) *It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties in-*

cident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal."

To the same effect are:

Petrol Corporation v. Chartrand, 93 Cal. App. 2d 635, 641, 209 P. 2d 674;

Ramey v. Myers, 111 Cal. App. 2d 679, 685, 245 P. 2d 360.

The state court action against the agent Blade did not, as the trial court below assumed, arise out of a waiver of tort, but arose rather out of a contractual, and in fact statutory, obligation of the agent to account to his principal for commissions received from the defendant suppliers.

In *De Leonis v. Etchepare,* 120 Cal. 407, 52 Pac. 718, the court affirmed an order of the trial court refusing to dissolve an attachment in an action brought against an agent for monies rightfully belonging to the plaintiff principal. The court held that the action arose not out of tort but out of contract. Page 409:

"Appellant's second contention is that the action is not founded upon a contract, either express or implied, for the direct payment of money.

"That the relation between the parties created by the power of attorney is a contract relation is beyond question. *Nor is the character of that relation, so far as defendant's duties and liabilities are concerned, affected by the alleged fact that it was created by or through the fraud of defendant.* Moneys received by the agent are not his, and from the duty of the agent to pay over moneys received by him in that capacity the law implies a promise that he will do so upon demand, and a demand is duly alleged."

As is stated more generally in 2 American Jurisprudence, Agency, Section 425, page 333:

> "The principal may maintain an action to recover money belonging to him in the hands of his agent which the latter refuses to pay. In the code states, this is by means of the ordinary civil action. At common law, *assumpsit* is the proper form of action. It is immaterial how the money which in equity and good conscience belongs to the master or principal came into the hands of the servant or agent."

The state court action against Blade was in the form of a common count for money had and received for the account of Sears, Roebuck & Co. [R. 38-39]. In the bill of particulars filed by Appellant in the state court action (in which nothing is said about any conspiracy to defraud or overcharge for engraving services [R. 45-47]), Appellant, after referring to the secret commissions or bribes paid to and received by its employee Blade, noted:

> *"The above amounts were received by said Frank R. Blade for the account of plaintiff but were not reported to plaintiff or accounted for by said Blade, and plaintiff did not ascertain that said sums had been paid to and received by said Blade until the month of December, 1951"* [R. 46].

The complaint in the state court action, as well as the bill of particulars, were incorporated by reference in the affidavit in support of Blade's motion for summary judgment in the trial court [R. 61-64]. That the bill of particulars is properly to be looked to to determine the nature of the state court action is clear from the cases.

Treadwell v. Nickel, 194 Cal. 243, 263, 228 Pac. 25:

> "The bill of particulars furnished to the defendants was, of course, to be regarded as an amplification of the complaint, and for the purpose of determining plaintiff's right to recovery, or the admissibility of evidence that might be offered in support of his claim was to be considered as if it had been incorporated in the complaint as originally filed. (*Millet v. Bradbury,* 109 Cal. 170, 172 (41 Pac. 865).)"

There is no dispute in the record that the state court action was for monies received by Blade as an employee for the account of Sears, Roebuck & Co. Thus, the state court action had its foundation in the contractual employer-employee relationship of Sears, Roebuck and Blade. The present action is founded strictly upon tort, for the recovery of fraudulent overcharges inflicted upon Appellant through the connivance of Blade and the engraving suppliers. The separate and distinct character of the two actions is further pointed up by the fact that Appellant has a right to the recovery of exemplary damages in the case at bar (Calif. Civ. Code, Sec. 3294) which it did not have in the state court action for monies received by its employee for its account; *Cf. Tarnowski v. Resop, supra.*

If the State Court Action Constituted an Affirmance of the Engraving Purchases, the Right to Recover Damages None the Less Remained.

Not only did the trial court assume an erroneous premise in concluding that the state court action against Blade was predicated upon a waiver of tort, to-wit, the fraudulent conspiracy entered into between Blade and the other de-

fendants to defraud Appellant, but it also erred in concluding that the maintenance of the state court action constituted an affirmance of the dealings between Blade and his co-defendants, precluding recovery of damages from the defendants. Although the cases cited under Point I demonstrate that an action against an agent by his principal for secret profits does not constitute an affirmance of the agent's corrupt dealings with third parties, the law is nonetheless clear that even should it be assumed *arguendo* that the state court action constituted an affirmance of the engraving purchase contracts that would not prevent the recovery of consequential damages for the fraud of the sellers. Upon discovery of the fraud, the one defrauded may either disaffirm and rescind or affirm the contract and seek damages for his injuries.[1]

Bagdasarian v. Gragnon, 31 Cal. 2d 744, 750; 192 P. 2d 935:

> "When a party learns that he has been defrauded, he may, instead of rescinding, elect to stand on the contract and sue for damages, and in such case his continued performance of the agreement does not constitute a waiver of his action for damages. (*Paolini v. Sulprizio,* 201 Cal. 683, 685-687 (258 P. 380); *Thompson v. Modern School of B. & C.,* 183 Cal. 112, 117-118 (190 P. 451); see Prosser on Torts (1941), 775; 12 Cal. Jur. 782.)"

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[1]The portion of the trial court's opinion, to which we here advert for its *non sequitur,* is as follows: "That being so, the election of the plaintiff to sue in the state court *ex contractu* and the securing of the attachment against Blade affirmed the acts of Blade in dealing with the other defendants and the plaintiff is now estopped to bring the within suit against any of them." [R. 82.]

Kaluzok v. Brisson, 27 Cal. 2d 760, 763; 167 P. 2d 481:

> "Two remedies are available to a vendee who has been induced to enter into a contract of purchase by the fraudulent representations of his vendor. First, the defrauded vendee may elect to affirm the contract, retain the property received under it, and sue the vendor for damages in an action for deceit. Secondly, the defrauded vendee may elect to rescind the contract for fraud, restore possession to the vendor, and recover the purchase money paid less the fair value of the use of the property during his occupancy."

Paolini v. Sulprizio, 201 Cal. 683, 685, 258 Pac. 380;

12 Cal. Jur. "Fraud and Deceit," Sec. 49, p. 781;

Restatement of Agency, Sec. 97.

This well settled right of election, to rescind or to affirm and recover damages, is of course equally available to a principal victimized by the fraud of his agent and a third party.

In re Dant & Dant of Kentucky (D. C. Ky.), 39 Fed. Supp. 753, 755, affirmed 125 F. 2d 108:

> "It is a well-settled principle of the law of principal and agent that a contract made by an agent in the name of his principal, in which inures to the agent a secret profit, not known to or acquiesced in by the principal, is a voidable contract on the part of the principal upon discovery of the facts. Wardell v. Union Pacific R. Co., 103 U. S. 651, 26 L. Ed. 509; Thomas, Trustee v. Brownville, etc., R. Co., 109 U. S. 522, 3 S. Ct. 315, 27 L. Ed. 1018; Bank of Louisville v. Gray, 84 Ky. 565, 2 S. W. 168; Johnson v. Mitchell,

192 Ky. 444, 233 S. W. 884; Louisville Point Lumber Co. v. Thompson, 202 Ky. 263, 259 S. W. 345. Upon the discovery of the fraud the injured party has the option of two remedies, namely—(a) he can disaffirm the contract by tendering back the property received and asking for a rescission of the contract obligation; or (b) *he can affirm the contract and seek damages for his injuries either by an action for deceit* or by way of defense or counterclaim in a suit brought against him for failure to completely perform the contract. Ades v. Wash, 199 Ky. 687, 251 S. W. 970; Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S. W. 2d 1."

It seems abundantly clear that even if (contrary to the authorities heretofore cited) the state court action against Blade for money had and received might have constituted an implied affirmance of the engraving contracts, such affirmance would not in any sense prevent the recovery of damages by Appellant for the fraudulent overcharges alleged in the amended complaint herein.

III.

The Doctrine of Election of Remedies Has Application Only in the Case of Inconsistent Remedies.

As noted above, the question upon which this appeal hinges is whether upon the facts as alleged in Appellant's amended complaint Sears, Roebuck & Co. has but a single cause of action jointly against its purchasing agent Blade and the engraving suppliers, or whether it has concurrent causes of action against Blade, for the recovery of secret commissions paid to and received by him, and against Blade and the engraving suppliers for the fraudulent overcharges made pursuant to the conspiracy between them. From the cases cited above we believe it to be clear that

Appellant has the two separate and distinct rights of recovery and that they are not in any wise inconsistent one with the other.

In 17 Cal. Jur. 2d, "Election of Remedies," Section 7, page 229, it is stated:

> "Where remedies are inconsistent, an election to pursue one bars pursuit of the other. But the doctrine of election of remedies bars only inconsistent remedies. Where remedies are concurrent and consistent, whether against the same person or different persons, a party may pursue one or all of them until satisfaction is had."

See:

Perkins v. Benguet Cons. Min. Co., 55 Cal. App. 2d 720, 755, 132 P. 2d 70;

Friederichsen v. Renard, 247 U. S. 207, 213, 62 L. Ed. 1075, 1084.

As was said in *Bauman v. Harrison,* 46 Cal. App. 2d 84, 88, 115 P. 2d 530:

> "As the doctrine of election of remedies is based upon the doctrine of estoppel, in order to sustain a theory of irrevocable election it must be shown that the two remedies are inconsistent and repugnant and that by the exercise of both the defendant would suffer unconscionable, unfair and unjust detriment."

The two remedies of Sears, Roebuck & Co. (i) to recover from its employee secret commissions received by him in the course of his employment, and (ii) to recover from the defendants in the present action the damages sustained by Appellant by reason of the fraudulent overcharges, are, as established by the authorities, neither inconsistent nor repugnant. The one is to recover monies

rightfully belonging to the employer (Calif. Labor Code, Sec. 2860, and *Savage v. Mayer, supra*), the other is to recover damages for the alleged fraudulent overcharges.

The trial court's reliance upon *Steiner v. Rowley,* 35 Cal. 2d 713, 221 P. 2d 9 [see R. 73] is misplaced since it clearly appears from that action that the plaintiff was seeking to recover from his agent, both in the first three counts in money had and received upon which an attachment issued, and in the fourth count sounding in tort for fraud, the same monetary damages—to-wit, commissions received from a third party and alleged secret profits. The court very properly held that the same monies could not be recovered from the same person on a theory of implied contract on the one hand and in a delictual count on the other. Accordingly, the court affirmed the sustaining of defendant's demurrer to the fourth count. Both *Steiner v. Rowley, supra,* and *Estrada v. Alvarez,* 38 Cal. 2d 386, 240 P. 2d 278, relied upon by the trial court, involved an election of remedies between different forms of action to recover the *same money* from the *same party.* In the present case, the Appellant, as we have emphasized is not seeking recovery of the secret commissions paid to and received by Blade, but is seeking recovery of damages incurred by it by reason of the alleged fraudulent overcharges. Again we emphasize, these are not alternative remedies but are separate and concurrent remedies.

The trial court in its opinion concluded:

> "The money received by Blade and sought to be recovered in the state court is part of the damages sought to be recovered in the instant action" [R. 74].

That this is not so is demonstrated by the fact that while the amended complaint alleges the receipt by Blade of secret rebates and commissions from the defendant engravers in the amount of $400 per month, recovery is sought only of the alleged fraudulent overcharges made. Whether those overcharges included or did not include the $400 per month which the defendant engravers paid to Blade, is a question of fact for resolution at the trial of the action. It may be—although the cases cited above in Point I hold to the contrary—that if the defendants can sustain the burden proving that the alleged overcharges for which recovery is sought in this action included the amount of wrongful commissions or rebates paid by them to Blade, and if recovery is finally effected by Appellant against Blade in the state court action, recoverable damages in the present case may be credited *pro tanto* with the state court recovery, but that fact does not militate against the right of Appellant to pursue its separate and distinct right of recovery for the damages suffered by it by reason of the overcharges alleged.

The same observation we have made with respect to the *Steiner* case applies equally to *Robb v. Vos,* 155 U. S. 13, 39 L. Ed. 52, and *Insurance Co. of North America v. Fourth Natl. Bank* (C. C. A. 5th), 28 F. 2d 933, upon each of which the trial court relied. In each of these cases there was but a single loss for which the plaintiff sought recovery.

Robb v. Vos, supra, as appears from a reading of the case, turned upon the ratification and adoption by the plaintiff of the acts of its agent, and the consequent prejudice thereby visited upon innocent third parties. (See p. 39 of 155 U. S.; 39 L. Ed. 52, 61.) It is ridiculous to suggest in the instant case that Sears, Roebuck & Co. as principal, in seeking to recover from its unfaithful employee secret commissions and bribes paid to him in the course of his employment, thereby condoned, forgave or ratified the fraudulent overcharges for engraving which Appellant had suffered over the years.

In *Insurance Co. of North America v. Fourth Natl. Bank, supra,* the plaintiff Insurance Company, after learning of the fraud of its agent, who fabricated and then approved claims of loss on its outstanding policies and by forging the names of the payees thereafter collected the drafts drawn by plaintiff on itself, sued the agent and his wife to recover the funds representing the proceeds of the drafts and received some funds and property in settlement of the action from the agent. The court held the plaintiff Insurance Company could not thereafter proceed against the drawee bank to recover *the same funds* paid out upon the forged endorsements.

IV.

Even Though the Actions Might Have Been Joined, a Party May Nevertheless Bring Separate Suits on Separate Causes of Action.

In addition to its holding that Appellant had made an irrevocable election by initiating the state court action against Blade and securing an attachment, the trial court further rested its decision upon the impropriety of Appellant attempting to split a single cause of action. Again, the correctness of the trial court's decision stands squarely upon the basic premise, assumed by it throughout, that plaintiff had but a single cause of action for the invasion of a single primary right. If, as we believe the cases unequivocally demonstrate, Appellant had separate and distinct causes of action (i) for the recovery of secret commissions paid to and received by its employee in the course of his employment, and (ii) for damages incurred by reason of the alleged overcharges as a result of the fraudlent conspiracy of Blade and the defendant engravers, the causes of action, while they conceivably might have been joined,[2] there can be no improper splitting of a cause of action unless the matter involved in the two actions is the same, so that a final adjudication in

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[2]Although Judge Reeves in *Callinan v. Federal Cash Register Co., supra,* suggests the possibility of misjoinder in such a case. See *Palpar, Inc. v. Thayer,* 83 Cal. App. 2d 809, 810, 189 P. 2d 752 "A party may bring separate suits on separate causes of action even if joinder is allowed. (1 Cal. Jur. 346; *Lynch v. Kemp,* 4 Cal. 2d 440, 49 Pac. 2d 817)".

the one would necessarily constitute a determination of the other.

1 Cal. Jur. 2d "Actions", Section 76, page 703.

We have already shown that recovery from an agent of secret profits or commissions does not necessitate any proof of fraud or deceit.

> "It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal."
>
> *Savage v. Mayer, supra.*

Recovery in the present action, on the other hand, necessitates proof of the allegations contained in Appellant's amended complaint, namely, the fraudulent conspiracy of Blade and the engraver defendants to overcharge Appellant for engraving furnished. As was pointed out by this court in its comprehensive analysis of identity of causes of action, and of "splitting causes of action", in *United States v. Pan American Petroleum Co.*, 55 F. 2d 753, at 776, *et seq.* (cert. denied 287 U. S. 612):

> "The proper test as to the identity of causes of action is to inquire whether the same evidence that is necessary to maintain the second action would have been sufficient to support the first." (P. 781 of 55 F. 2d.)

Another statement explaining the rule against splitting a single cause of action is to be found in *Woodbury v. Potter* (C. C. A. 8th), 158 F. 2d 194, 195, as follows:

> "The rule, however, does not prevent the bringing of separate actions on separate causes of action even though they might all have been joined in a single suit. United States v. Haytian Republic, 154 U. S. 118, 14 S. Ct. 992, 38 L. Ed. 930. It is therefore necessary to consider the nature of plaintiff's claim for the purpose of determining whether they constitute a single cause of action or two separate and distinct causes of action. One of the tests for determining whether the cause of action asserted in a suit is the same as that prosecuted in a prior suit is whether or not proof of the same facts will support both actions. Harrison v. Remington Paper Co., *supra;* United States v. Haytian Republic, *supra;* United States v. Pan-American Petroleum Co., 9 Cir., 55 F. 2d 753. If the same evidence will support both actions there is deemed to be but one cause of action. Of course, the mere fact that the same evidence may be admissible under the pleadings in each action is not necessarily controlling, but even though the evidence may be admissible and is in part the same, but the subject matter is essentially different, the actions are not identical. *In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions.* McKnight v. Minneapolis Street Railway Co., 127 Minn. 207, 149 N. W. 131, L. R. A. 1916D, 1164. The mere fact that different demands may spring out of the same act or contract does not itself render a judgment on one a bar to a suit upon another."

Applying this identity of evidence test to the case at bar, it is manifest that proof of the receipt by Blade of secret commissions and bribes in the state court action, which would be sufficient there to permit recovery by Appellant, would be wholly insufficient to support a recovery of the fraudulent overcharges allegedly made by the defendant engravers. By like token, it would not be necessary in this action to prove the payment to Blade of secret commissions and bribes, to recover for the fraudulent overcharges, but only to show that the defendant engravers and Blade, as Appellant's advertising manager, conspired to make and did make the improper charges.

If Appellant establishes its allegations of a conspiracy between Blade and the defendant engravers to defraud it, recovery of the damages suffered may be had against each of the participants in such conspiracy regardless of whether such participant profited from the fraud or not.

Anderson v. Thacher, 76 Cal. App. 2d 50, 72, 172 P. 2d 533;

Anglo-California National Bank v. Lazard (C. C. A. 9), 106 F. 2d 693, 703, cert. den. 308 U. S. 624, 84 L. Ed. 521;

B. F. Goodrich Co. v. Naples (D. C., S. D. Cal.), 121 Fed. Supp. 345, 348.

Thus, in the one suit proof of fraud is unnecessary and in the other proof of the receipt of secret profits or commissions is unnecessary.

V.

The Statute of Limitations Did Not Commence to Run Until December 10, 1951, at the Earliest.

If, as we believe they must be, the judgments in this case are reversed and the cause remanded for trial upon Appellant's amended complaint, the trial court's finding that the complaint does not state a claim for relief against the defendant engravers for any damages accruing prior to May 2, 1949 (three years antedating the filing of the original complaint herein) should be corrected. The trial court, upon the basis of judicial knowledge that the Appellant "is a large concern", was of the view, expressed in its opinion, that the complaint did not sufficiently allege the reasons why Appellant by the exercise of reasonable diligence could not sooner have ascertained and learned "of the peculations of the defendant Blade and the alleged fraud of the other defendants" [R. 82-86]. We believe that the court overlooked the following material allegations of the amended complaint, which allegations for purposes of the present judgments upon the pleadings must be taken to be true:

> "That at all times herein mentioned prior to on or about December 10, 1951, plaintiff believed that its said employee, the defendant, Frank R. Blade, was an experienced and competent Advertising Manager and was loyal and devoted to the business and interests of plaintiff; that at all said times, plaintiff reposed complete confidence in said Frank R. Blade, both with respect to his capability as Advertising Manager and with respect to his loyalty and devotion to its business and interests, and depended and relied upon him with respect to the proper performance of his duties as its Advertising Manager, including the negotiation of contracts for engravings for plain-

tiff; *that the formulas and techniques for computing rates for engraving work of the nature herein involved were matters with which plaintiff had no familiarity or knowledge and concerning which plaintiff was compelled to and did rely upon the knowledge, experience, expertness, loyalty and good faith of its said Advertising Manager, the defendant, Frank R. Blade.*" [R. 15.]

The court further apparently overlooked the accepted doctrine that lack of diligence of discovery is inapplicable to fraud which has its inception in a fiduciary relationship.

Anglo-California National Bank v. Lazard (C. C. A. 9th), 106 F. 2d 693, 704; cert. den. 308 U. S. 624;

B. F. Goodrich Co. v. Naples (D. C., S. D. Cal.), 121 Fed. Supp. 345, 348;

Rutherford v. Rideout Bank, 11 Cal. 2d 479, 486; 80 P. 2d 978;

Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 440; 159 P. 2d 958;

Bainbridge v. Stoner, 16 Cal. 2d 423, 430; 106 P. 2d 423;

Knapp v. Knapp, 15 Cal. 2d 237, 242; 100 P. 2d 759;

Lee v. Hensley, 103 Cal. App. 2d 697, 704; 230 P. 2d 159;

Anderson v. Thacher, 76 Cal. App. 2d 50, 69; 172 P. 2d 533;

Victor Oil Co. v. Drum, 184 Cal. 226, 241; 193 Pac. 243;

Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 576; 126 Pac. 351.

Conclusion.

We believe the trial court erred in its conclusion that Sears, Roebuck & Co. was limited to the single recovery against its corrupted employee in the state court action, a conclusion dictated by the court's assumption that Appellant had but a single cause of action for the invasion of a single primary right. The cases demonstrate that under circumstances such as those alleged in the case at bar an employer has the unquestioned right to recover from its employee commissions or bribes wrongfully paid the employee during and in the course of his employment and has in addition the right to recover from each of those participating in a conspiracy to defraud it the damages it has sustained.

We cannot do better than adopt the quotation from Pomeroy's Code Remedies (Fifth Edition) Section 350, quoted by this court in *United States v. Pan American Petroleum Co.*, 55 F. 2d 753, at 777:

> "'If two separate and distinct primary rights could be invaded by one and the same wrong, or if the single primary right should be invaded by two distinct and separate legal wrongs, in either case two causes of action would result; a *fortiori* must this be so when the two primary rights are each broken by a separate and distinct wrong.'"

The judgment of dismissal in favor of Metropolitan Engravers, Ltd., Metropolitan Mat Service, and its individual officers and agents, Gregory Duffy, Aubrey Duffy,

Walter Duffy and Alfred Smutz, and the summary judgment in favor of Frank R. Blade, should each be reversed and the cause remanded to the District Court for trial.

Respectfully submitted,

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